

**DEPARTMENT OF STATE REVENUE**

**LETTER OF FINDINGS NUMBER: 97-0403 ST**

**Sales Tax**

**Years: December 31, 1992, 1993, 1994, 1995, And March 1, 1996**

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**ISSUES**

I. **Sales Tax.** – Imposition

Authority: IC 6-8.1-5-1(a)

The taxpayer protests the "Best Information Available" assessment.

II. **Penalty.** – Fraudulent intent to evade tax.

Authority: 6-8.1-10-4

The taxpayer protests the imposition of the 100% fraud penalty.

**STATEMENT OF FACTS**

This Letter of Finding is in regard to the protest of the sales/use tax audit performed by the Department for the years January 1, 1992 through March 1, 1996.

The taxpayer is a used car dealer located on the west side of Indianapolis. The taxpayer was incorporated in 1989.

I. **Sales Tax.** – Imposition

**DISCUSSION**

The taxpayer protests the “Best Information Available” assessment. The Department requested records from the taxpayer. The taxpayer stated the records were not available as the records were destroyed in a fire and two burglaries. As no records were available, the Department used the Bureau of Motor Vehicle Title Transaction report to calculate gross revenue.

The taxpayer argues the Bureau of Motor Vehicle Title Transaction report is not a good audit source. First, the taxpayer argues that there are reporting errors. Secondly, the report does not consider sales tax reduction resulting from the cessation of car payments when cars are stolen, damaged, or repossessed.

The taxpayer gives no evidence of BMV reporting errors, or, occurrences of ceased car payments in the Bureau of Motor Vehicle report. This, the taxpayer states, is because the records were destroyed in a fire and two burglaries. There is no casualty report that a fire occurred. There are police reports that substantiate the burglaries, but there is no documentation that records were destroyed. As such, the Department does not feel the taxpayer has provided evidence of BMV reporting errors, or, occurrences of ceased car payments in the Bureau of Motor Vehicle report.

Indiana Code 6-8.1-5-1(a) states, “If the department reasonable believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. The amount of the assessment is considered a tax payment not made by the due date and is subject to IC 6-8.1-10 concerning the imposition of penalties and interest. The department shall send the person a notice of the proposed assessment through the United States mail.”

As there were no taxpayer records available, the Department relied on the Bureau of Motor Vehicle Title Transaction reports to calculate the sales obligation. The Department finds the reports to be a good source.

**FINDING**

The taxpayer’s protest is denied. The Bureau of Motor Vehicle Title Transaction report is a good source from which to calculate the sales tax obligation.

II. **Penalty.** – Fraudulent intent to evade tax.

**DISCUSSION**

The taxpayer protests the imposition of the 100% fraud penalty. The Department assessed the penalty as the Department has sound evidence the taxpayer collected the

sales tax and did not remit the tax to the State. The basis for the Department's position is Indiana Regulation 45 IAC 15-5-7(3).

Indiana Regulation 45 IAC 15-5-7(3) states:

A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

With regard to part (A), the taxpayer committed a misrepresentation of material fact in that the taxpayer did not report all of the sales tax collected by the taxpayer. The Bureau of Motor Vehicle Title Transaction report is an accurate approximation of the sales tax collected by the taxpayer. 87% of the sales tax on the Bureau of Motor Vehicle report was not reported or remitted on the sales tax returns by the taxpayer. As such, the taxpayer committed a misrepresentation of material fact.

With regard to part (B), scienter: The taxpayer knew of his requirement to collect tax in that the ST-108 sales tax certificate specifically asks the taxpayer to confirm that sales tax was collected

Each time a car is sold, a ST-108 sales tax certificate is produced by the taxpayer and given to the taxpayer's customer. The customer then takes the ST-108 sales tax certificate to the Bureau of Motor Vehicles where the customer obtains a title and confirms that sales tax was paid when the car was purchased. The Bureau of Motor Vehicle Title Transaction report is an accumulation of all of the ST-108 sales tax certificates for a given taxpayer.

The ST-108 sales tax certificate states, "I hereby certify that the information shown on this certificate is true and correct and the amount of Gross Retail Sales/Use Tax was collected from the purchaser." The certificate then has the taxpayer sign the certificate acknowledging collection of sales tax. Clearly, the taxpayer has confirmed his duty to collect sales tax and remit the sales tax to the State of Indiana in that he produced and sign the ST-108 sales tax certificate. Here, scienter is proved.

With regard to part (C), deception: The taxpayer deceived the Department into believing the sales tax reported was accurate. Whereas in reality, the sales tax reported and remitted was far less than the actual sales tax collected.

With regard to part (D), reliance: The Department relied on the ST-103 Sales tax returns filed by the taxpayer as accurate. As such, the money remitted to the state was far less than the money which should have been remitted.

With regard to part (E), injury: The taxpayer injured the Department in that a material amount of money due the State of Indiana from sales tax collections was not paid to the Department.

Indiana Code 6-8.1-10-4 (a) & (b) state, "If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent to evade the tax, the person is subject to a penalty. . . . The amount of the penalty imposed for a fraudulent failure . . . is one hundred percent (100%) . . ."

To conclude, the Department finds the taxpayer fraudulently avoided to remit sales tax to the State of Indiana. The taxpayer knew of his obligation to collect and remit tax as this was documented on the ST-108 sales tax certificate. The non-remittance was material in that 87% of the tax collected by the taxpayer was not remitted.

### **FINDING**

The taxpayer's protest is denied. The Department finds the taxpayer fraudulently avoided the remittance of sales tax to the State of Indiana.